

SERVED: February 3, 1992

NTSB Order No. EA-3479

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 15th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

EARL R. ALLEN,

Respondent.

Docket

SE-8458

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis on July 20, 1988 at the conclusion of an evidentiary hearing.¹ By that decision, the law judge suspended respondent's airline transport pilot ("ATP") certificate for 30 days, upon a finding that he violated section 91.9 of the Federal Aviation Regulations

¹ That portion of the hearing transcript that contains the initial decision and order is attached.

("FAR"), 14 CFR Part 91.² We deny the appeal.³

The parties agree on only the most basic facts: on October 18, 1986, respondent piloted a Lake LA-4 amphibian seaplane (#N1118L); respondent was carrying three passengers on a pleasure flight; and, upon landing on Folsom Lake, CA, the seaplane flipped and sank, injuring respondent and the passengers.

The parties disagree as to the cause of the accident. The Administrator claims that the accident was caused by respondent's landing when waves on the lake were 1 1/2 to 2 feet,⁴ in winds of approximately 15-20 miles per hour, and with a quartering tail wind. Respondent argues that he was not careless, claiming that he landed into the wind, the wind was considerably less than 15-20 miles per hour at the landing area, and that the accident was caused by the aircraft's striking a submerged object.

The law judge took the testimony of, among others, a number

² FAR section 91.9 prohibited a person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ The Administrator initially suspended respondent's commercial pilot certificate for a period of 120 days. Subsequent to the events that gave rise to this proceeding, respondent obtained an ATP certificate. At the hearing, the law judge granted the Administrator's request that the sanction be amended to apply to the ATP certificate. This ruling was not appealed.

Also at the hearing, the Administrator's representative reduced the sought suspension to 90 days. The Administrator has not appealed the law judge's further reduction of the suspension.

⁴ The LA-4 manual recommends that landings not take place when wave heights exceed 1 foot. Although respondent's answer alleged that the training syllabus for the aircraft authorized landing with waves up to 18 inches, this argument was not pursued at the hearing, nor was the referenced syllabus introduced.

of witnesses to the accident. He found the wind and water conditions to be as alleged by the Administrator. He found inadequate support for respondent's claim of a submerged object, instead accepting expert testimony that landing in such rough water, combined with the wind velocity and direction, could well have caused the hull of the seaplane to rip open.⁵

On appeal, respondent argues that a number of the factual findings contained in the law judge's decision are not based on "a preponderance of reliable, probative, and substantial evidence." Respondent so characterizes the law judge's findings of fact regarding the landing flight path and resulting wind conditions, and the height of the waves, and challenges his failure to find that a submerged object caused the accident.

The decision in this case turns on issues of witness credibility. It is well established that resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. See, e.g., Administrator v. Smith, NTSB Order EA-2438 (1987) at p. 8, and cases cited there. Respondent has not demonstrated that the law judge's findings were in any manner arbitrary or capricious.

The law judge rejected respondent's (and his supporting witnesses') testimony regarding flight path and weather and water conditions, instead accepting evidence submitted by not one, but two, clearly disinterested eye witnesses, with the weather and water condition evidence confirmed by other witnesses not at the

⁵ See, for example, Tr. at p. 233, 234.

scene at the time. In the circumstances, we cannot find this to be error.⁶ Furthermore, the law judge's finding regarding the cause of the accident was consistent with, and followed from, the aircraft design and capability testimony of the expert witness. Overall, we cannot find that the law judge's findings are so without basis in the record as not to constitute reliable, probative and substantial evidence.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order (as modified) and the initial decision are affirmed; and
3. The 30-day suspension of respondent's airline transport pilot certificate shall commence 30 days after service of this opinion and order.⁷

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶ Respondent had four supporting witnesses. Ms. Arey, one of the passengers on the flight, cannot be said to be disinterested. In any case, her evidence was far less detailed than that of the witnesses on the water. Mr. Sauer testified only to general behavior of lake wind, not to winds at Folsom Lake or the wind conditions there at the time of the accident. Mr. Penketh, a pilot/acquaintance of respondent who was flying nearby at the time, testified to having seen respondent begin an approach to the northwest (into the wind). He did not see the landing, however, and admitted his inability to tell wave height from the altitude at which he was flying. Mr. Ermshar testified only to the frequent existence of debris on Folsom Lake, not to its existence in the area at the time of the accident.

⁷ For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).